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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ROBERT L. SCHUH, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 77-109 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This appeal came on for hearing before the Pollution Control Hearings Board, W. A. Gissberg (Chairman and presiding), Chris Smith and Dave J. Mooney on November 30, 1977 in Spokane, Washington. Appellant Robert L. Schuh asked for, and was denied, permission to transfer his ground water right to a new location. Respondent elected a formal hearing pursuant to RCW 43.21B.230. The Spokane court reporting firm of Reiter, Storey and Miller recorded the proceedings.

Appellant was represented by his attorney, John Moberg; respondent was represented by Robert E. Mack, Assistant Attorney General.

Having heard the testimony, having examined the exhibits, having considered the arguments, and being fully advised, the Hearings Board makes and enters the following

FINDINGS OF FACT

I

Appellant owns land in Section 12, Township 18, Range 26 E.W.M. in Grant County, Washington. The appellant seeks to irrigate this land and put it to agricultural use.

II

Rather than make application for a new ground water right, the appellant has chosen to contingently purchase an existing ground water certificate No. 888-A which is appurtenant to the farm of one James D. Redwine located in Section 18, Township 19, Range 27 E.W.M. in Grant County. It is about five miles distance from the Redwine farm to the appellant's land. Appellant seeks to change the point of withdrawal and place of use to his own land.

III

The history of Certificate No. 888-A is as follows. The appellant made his contingent purchase of it from James D. Redwine on February 17, 1976. James D. Redwine purchased it from the widow of one Albin O. Pederson, along with the farm to which it was appurtenant, on March 28, 1967.

Mr. Pederson's ownership of the farm commenced at a time prior to the farm's inclusion in the Columbia Basin Project by which the waters impounded by the Grand Coulee Dam are made available, by the United States government, for irrigation. In this time before the Project,

Mr. Pederson applied to the State of Washington for a right to withdraw public ground water. That application was approved by the issuance of Ground Water Permit No. 1221 which authorized the withdrawal of water in the amount of "640 acre/feet per year less the amount of water available from rights of Columbia Basin Project." Certificate 888-A confers a right to the use of ground waters "under and subject to provisions contained in Ground Water Permit No. 1221." Certificate 888-A thus includes the words of limitation appearing in the Permit, which words were inserted to reduce the state ground water right as federal Project water became available to the same farm.

On July 24, 1953, respondent's predecessor agency wrote to the federal Bureau of Reclamation concerning Certificate No. 888-A now before us. That letter stated:

> "Please be advised that Mr. Pederson's right does not contain the provision limiting the use of his well to a period until project waters are made available to his land. The subject water right was processed before that policy was adopted by this office."

The true meaning of this statement is that the subject right does not terminate outright when federal Project water becomes available. This statement does not conflict with the permit limitation reducing the amount of water available from the state, unit by unit, as units of federal project water become available.

The appellant has therefore purchased a ground water certificate whose limits recede as irrigation water becomes available from the federal Columbia Basin Project.

IV

On the date that appellant purchased the right embodied in

Certificate 888-A, February 17, 1976, 592.55 acre/feet per year were available to the Redwine-Pederson farm from the Columbia Basin Project. Substituting this established figure for the words which limit the right in Certificate 888-A, that right, as purchased by appellant, is for 47.45 acre/feet per year of public ground water.

V

Despite the fact that Mr. Redwine thus held a right to irrigate with ground water, water sufficient for all his irrigation needs has been made available to him by the federal Columbia Basin Project, and he has used the water thus made available. During Mr. Redwine's ownership of the subject ground water right from 1967 to 1976, water from the well associated with that right has not been used for irrigation purposes. The Certificate, Permit and ground water right here involved were issued exclusively for irrigation purposes, and therefore the ground water right itself has been unused for at least the period of Mr. Redwine's ownership.

VI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

This appeal requires us to review two, distinct changes to a ground water right:

1. Its assignment from one person to another, and

2. Its change in location from one place to another.

II

Assignment from one person to another. The assignment of the ground water right embodied in Certificate 888-A from James D. Redwine to appellant is valid. This is so because a certificate shows that ground water has been appropriated in accordance with a permit. RCW 90.44.080. Pursuant to RCW 90.44.060, ground water permits are governed, inter alia, by RCW 90.03.310 which states that:

> Any permit to appropriate water may be assigned subject to the conditions of the permit . . . ."

This latter statute is but a restatement of the fundamental rule of common law that although a right is assignable, one may not assign a right greater than he holds.

While the assignment from Mr. Redwine to appellant is valid, therefore, it is only valid to convey whatever right was created by the terms of the permit. In determining the scope of that right we will consider those facts which exist on the day of assignment. We therefore conclude that the right assigned in this matter was, by the terms of the permit, "640 acre/feet per year less the amount of water available from rights of Columbia Basin Project" (592.55 acre/feet per year on the day of assignment) or 47.45 acre/feet per year of public ground water.

We are aware of the July 24, 1953, letter of respondent's predecessor which stated that the permit before us does not terminate when federal project water becomes available. There is nothing inconsistent between this letter and our construction of the permit, just expressed. However, although we know of the letter, we have not relied on it in construing the permit. Rather, we have looked

to the terms of the permit which are unambiguous in requiring a reduction of the state water right as federal Project water becomes available. There being no ambiguity in the terms of the permit, we will not look behind it in a further search for the intention of the issuing administrative agency. ITT Rayonier v. DOE, PCHB Nos. 970 and 1025 (1976) and cases cited therein.

The permit limitation which reads "less the amount of water available from rights of Columbia Basin Project" is, itself, a valid exercise of the respondent's authority under RCW 90.44.060 and 90.03.290 wherein it states:

> Any applications may be approved for a less amount of water than applied for, if there exists substantial reason therefore . . . ."

Where, as here, the state issues an irrigation water right to a farm owner who subsequently obtains, and uses instead, a federal water right to irrigate the sare farm, substantial reason exists for the state to have so limited its right that it recedes accordingly, and thereby avoids the "stacking" of duplicative water rights which together would exceed the irrigation needs of the farm concerned.

III

Change in location from one place to another. Appellant's application for change of the point of withdrawal and place of use purports to apply to a water right of 640 acre/feet per year. But in as much as we have concluded that the ground water right assigned to appellant is for 47.45 acre/feet per year, his application for more than this amount was properly denied by respondent under the terms of RCW 90.44.100(3) which states:

> Such amendment shall be issued by the supervisor only on condition that: . . . (3) the construction of an additional well or wells shall not enlarge the right conveyed by the original permit or certificate; . . . ."

For further reasons now to be stated, respondent properly denied the appellant's application for change of the point of withdrawal and place of use, even for the 47.25 acre/feet per year of ground water which was the right assigned to appellant.

The respondent's predecessor had curtailed further ground water development in the Quincy Basin in March, 1969, "pending the outcome of detailed ground water investigations to determine if further appropriations of public ground water in this area should be allowed," WAC 173-124-010. In March, 1973, acting pursuant to RCW 90.44.130 the respondent established the Quincy Ground Water Subarea, WAC 173-124-020. All locations pertinent to this appeal are within this Quincy Subarea. Following extensive study and an inventory or accounting of all existing water rights and certificates, the respondent, in January, 1975, adopted regulations for the administration of the ground waters with the Subarea.

The respondent has made a determination in this case that:

> If ground water is determined to be available for appropriation at the new location, the Department would be obligated to process pending applications for new permits in that area prior to transferring existing unused rights. The Department is currently holding 213 applications for priority purposes. Exhibit R-3, Summary of Facts No. 7

To allow a change of the point of withdrawal of this permit a distance of five miles within the Subarea would, if followed by others, substantially and detrimentally affect and subvert the comprehensive

regulatory and management scheme adopted by the respondent for the Quincy Subarea under which pending applications have not been acted upon since 1969. We hold that the change in location applied for by appellant is thus contrary to the public welfare. See Sparks v. D.O.E., PCHB No. 77-43 (1977).

Under RCW 90.44.100 pertaining to changes in point of withdrawal, the respondent must make "findings as prescribed in the case of an original application." By RCW 90.44.060 these findings include those set out in RCW 90.03.290, one of which is that the application "will not . . . be detrimental to the public welfare." Appellant's application for change of the point of withdrawal and place of use is detrimental to the public welfare, and the action of respondent in denying it must therefore be affirmed.

IV

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Pollution Control Hearings Board enters this

ORDER

The action taken by the Department of Ecology which denied appellant's application is affirmed.

DATED this 14th day of December, 1977.

POLLUTION CONTROL HEARINGS BOARD

W. A. GISSBERG, Chairman

DAVE J. MOONEY, Member

CHRIS SMITH, Member